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THE CONSTITUTION, THE COURT, AND THE PEOPLE

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THE CONSTITUTION, THE COURT, AND THE PEOPLE.[1]

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The institution known as the American Republic marks the extreme limit of the progress of mankind. The distribution, under our written Constitution, of the functions of government, is the crowning achievement of social order.

The rights of man have never been given full recognition elsewhere or hitherto. Individual initiative, enterprise and energy, have had their fruitage here. Our achievements and our standards of life, social and political, have turned the eyes of the oppressed and downtrodden of all lands toward America; and the struggling millions of Asia are stretching out eager hands toward us as the exponents of a civilization which has established the largest individual liberty, the right to hold the freest political and religious opinions, and brought about the highest average of human comfort ever known.

The material prosperity of the United States is the marvel of all the people of the earth. We have run cables under the sea; we have installed the wireless telegraph on land and sea; we are uniting the Atlantic and Pacific Oceans by the Panama Canal; we have subjugated all the elements; we have harnessed steam, electricity, fire, water, and air; the lost arts have been recovered, and in spite of the fact that our flag is conspicuously missing from the wide paths of commerce on the high seas, this nation is the foremost nation of the globe; we occupy that proud position because the fathers of the Republic and their successors have established between the two great oceans and the Lakes and the Gulf a government of all the people, by all the people, and for all the people, and not a government of one class over another, or of a majority that tramples on the minority. But no peoples have prospered, no governments have lasted, without the influence of law and lawyers. The forgotten nations, the buried civilizations, are those whose power and influence came through piracy and the conquests of war. India and Egypt are full of monuments of a departed greatness that knew no systems of law which gave justice to individuals. History records the decay and final defeat of every nation which has not possessed a system of law administered as a part of the government itself; of those Phœnicia, Babylon, Carthage, Greece, and Rome are familiar examples, and Turkey and Spain are modern instances. Moorfield Storey truly says that the Corpus Juris of Justinian is the most enduring monument of imperial Rome, and that Napoleon's most valuable legacy to the world is the code which bears his name.[2]

[1] An address delivered at the annual meeting of the California State Bar Association at Fresno, November 22, 1912.

[2] Reform of Legal Procedure, p. 10.

It is to the credit of the American bar that its leaders have had so much to do with the upbuilding of American institutions and our civilization and with the making of the laws under which this Nation has grown from the three millions who lived in scanty settlements bordering on the Atlantic coast to the ninety and more millions who have populated our country in its length and its breadth—laws that have made possible this climax of human effort. Has the mission of the lawyer ended? Has he lost his power and his right to influence among the people? I do not believe it.

The magazines, the daily newspapers, and political orators have freely criticized the system under which laws are administered in the United States. There is a great deal of popular dissatisfaction with the administration of law, but that dissatisfaction which expresses itself in fierce and unreasoning criticism of our courts and of the profession to which we belong is largely based upon ignorance of legal principles and misapprehension of the facts. There are defects in the administration of law in the United States which are a reproach to it. The delays and expense of litigation have no justification, and the useless and cumbersome science of procedure has obscured the merits of many a cause. To adopt the words of an eminent southern lawyer:

> However, because there is a leak in the roof we should not tear down the house; and because there are defects in the administration of law I can not yield myself to the proposition that our system of jurisprudence should be destroyed.[1]

And the bar is itself awake to these evils, and through the bar associations of the States and the American Bar Association there has come the assurance of radical reforms along these lines. In addition to this, the United States Supreme Court has revised the rules of Federal equity procedure so as to place the conduct of equity causes in the courts of the United States on a simple and rational basis and abolish useless formality and expense.

The courts and the bar may expect to be criticized for a defective and stupid administration of law, although the public itself, because of its well-known niggardliness toward the judiciary and the prevailing low grade of business morals, must bear its share of the blame for this.

The situation is one which should be met and dealt with in a spirit of fairness on our part, but we demand of the critics of the courts and the bar that they shall be fair, honest, and intelligent in their criticisms.

There are very many well-intentioned but poorly informed folks who talk a great deal about the Constitution and the courts and the people without any clear conception of the function of the judiciary under our form of government, and they talk about throwing aside not only the restrictions but the very safeguards that are contained in the Constitution of the United States, just like people change their clothes to suit different occasions and different degrees of temperature.

Students of American history are wont to think of those years which intervened between the close of the Revolutionary War and the adoption of the Federal Constitution as the critical period of

[1] "The unrest as to the administration of law," by Albert W. Biggs, of Memphis; annual address before Texas Bar Association, July 3, 1912.

American history, and that eminent historian, John Fiske, has thus designated that stormy time; but the present vociferous renewal of the original challenge both to the sufficiency and efficiency of our Constitution to provide a scheme of government adequate for the American people, and the bold assertion that it does not and can not serve the purpose when applied to twentieth-century conditions, makes pertinent the inquiry whether we ourselves may not be living in a time more pregnant with dangers than the fathers knew, for "nothing can be more incompatible with justice, nothing more corrosive of law, than sensation and excitement." [1]

Marshall, in his opinion in Marbury *v.* Madison,[2] gave a masterful exposition of the distribution of and limitations upon the powers of government under the Constitution in terms so logical as to admit of no denial from any thinking man who believes in our form of government, and in language so simple that it can not be misunderstood by anybody:

> That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness, is the basis on which the whole American fabric has been erected. The exercise of this original right is a very great exertion; nor can it, nor ought it, to be frequently repeated. The principles, therefore, so established, are deemed fundamental; and as the authority from which they proceed is supreme, and can seldom act, they are designed to be permanent.
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> This original and supreme will organizes the government, and assigns to different departments their respective powers. It may either stop here, or establish certain limits not to be transcended by those departments. The Government of the United States is of the latter description. The powers of the legislature are defined and limited; and that these limits may not be mistaken or forgotten, the Constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed are of equal obligation. It is a proposition too plain to be contested, that the Constitution controls any legislative act repugnant to it; or, that the legislature may alter the Constitution by an ordinary act.
>
> Between these alternatives there is no middle ground. The Constitution is either a superior paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and like other acts is alterable when the legislature shall please to alter it. If the former part of the alternative be true, then a legislative act, contrary to the Constitution, is not law; if the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power in its own nature illimitable.

That distinguished teacher, writer, and juristic philosopher, Roscoe Pound, recently said:

> A generation ago we were sure of our political institutions. Now criticism has become the fashionable note.[3]

Our generation refuses to accept the dogmas of its predecessors; skepticism and incredulity are taught in most of our higher institutions of learning. Kant says:

> The present age may be characterized as the age of criticism, a criticism to which everything is obliged to submit.

He further says that law on the ground of its majesty not uncommonly attempts to escape this necessity and thereby arouses the suspicion that its foundation is unsound. No mere theory goes

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[1] Roscoe Pound, Law and the People.
[2] 1 Cranch, 137, 175.
[3] Address before the Missouri State Bar Association, St. Louis, October, 1912, entitled "Social justice and legal justice."

unchallenged, and if a law, whether substantive or adjective, does not meet the public need it deserves to be displaced and superseded; but those limitations which the framers of the Constitution, the supreme law of the land, put in that instrument and which, after the fiercest debates in our history, the people adopted to protect the rights of the minority are not to be discarded at the will of a popular majority nor otherwise than through that solemn, deliberate procedure provided by the Constitution itself. Any other method of amending the Constitution under pretense of carrying out the popular will means revolution and involves a step 2,000 years backward.

Listen to Aristotle:

> It would seem a just criticism to assert that this kind of democracy is not a constitutional government at all, as constitutional government is impossible without the supremacy of laws. For it is right that the law should be supreme universally and the officers of state only in particular cases, if the government is to be regarded as constitutional. And as democracy is, as we have seen, a form of polity, it is evident that the constitution, in which all business is administered by popular decrees, is not even a democracy in the strict sense of the term, as it is impossible that any popular decree should be capable of universal application.[1]

The tendency to deny the claims of the existing order of things, though it may arouse our antagonism, calls for calm and dispassionate consideration. The experienced lawyer keeps his head in the hard-fought contests of the forum. If it is our ultimate duty to cleanse the administration of justice of its defects and reestablish the public confidence in our courts, it is our immediate duty to correct the current misunderstanding of the true relations of the Constitution and the courts and the people toward each other by directing attention to certain incontestible facts and fundamental truths which no patriot can disregard. Let me therefore sketch briefly the conditions which confronted the American people before our Constitution was adopted and show why a compact was made for a Union of States in the adoption of that Constitution which Gladstone said is "the most wonderful work ever struck off at a given time by the brain and purpose of man."

The Confederation had proven a rope of sand; and only through the patriotism and high purpose of Washington did the Revolution result in victory to the ragged, tired American forces. After the surrender of Cornwallis at Yorktown the efforts to establish credit abroad and tranquility at home were unsuccessful. Even before the Revolutionary Army had disbanded, in a letter known as Washington's legacy to the American people, he insisted upon four things which were essential to the existence of the United States as an independent power. Of these essentials, but two need be here noticed:

The first:

> An indissoluble union of all the States under a single Federal Government which must possess the power of enforcing its decrees.

The last:

> The people must be willing to sacrifice, if need be, some of their local interests to the common weal; they must discard their local prejudices and regard one another as fellow citizens of a common country with interests in the deepest and truest sense identical.[2]

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[1] The Annals of the American Academy of Political and Social Science, September, 1912, p. 37.
[2] Fiske: Critical Period of American History, 64.

The commercial and political rivalry between the States was sharp; the civilization they severally enjoyed differed in degree; the separation of the people was complete and their isolation so great as to be almost beyond our comprehension. There were no steamboats, no railroads, and it took a week or 10 days of uncomfortable and dangerous travel to go from Boston to New York, and, as the mails were irregular and uncertain and the rates of postage very high, people heard from one another but seldom.[1] It was impossible to raise a revenue to conduct a government. The States passed different traffic and tonnage acts and began to make commercial war upon one another. Connecticut and Pennsylvania quarreled over the Valley of the Wyoming, and the story of the treatment of the unfortunate Yankees by the Pennsylvania Legislature and militia is a chapter reciting the most cruel conduct ever charged against any of the American people, except our treatment of the Indian tribes. The long and bitter dispute between New York and New Hampshire for the possession of the Green Mountains broke out afresh, the farmers and merchants of Rhode Island were in a fierce controversy with each other, and Shay's rebellion occurred in Massachusetts. At this critical juncture, when anarchy seemed the doom of America, Washington conceived a project to connect the headwaters of the Potomac with the Ohio River and inspired the agreement between the States of Maryland, Virginia, and Pennsylvania with reference to the proposed enterprise. From this modest beginning the Constitution was evolved,[2] and the regulation of commerce was the chief motive for the Federal compact.[3]

The student of constitutional history is familiar with subsequent events which resulted in the adoption of the Constitution. The plan of the Federal Union, as proposed by the delegates from Virginia, which practically obliterated State lines and obliterated State rights, was substantially adopted, except as modified by giving to the several States equal representation in the Senate. But it is not to be forgotten that even then there were men of undoubted patriotism, as they understood patriotism, in and out of the constitutional convention, who bitterly opposed it, chiefly because it meant the surrender of divers powers which had always theretofore been exercised by the States.

James Wilson sought to have his associates take a larger view of the work in which they were engaged than the mere protection of local and transient interests. He said:

> We should consider that we are providing a Constitution for future generations and not merely for the peculiar circumstances of the moment.[4]

Again he said:

> I am lost in the magnitude of the object. We are laying the foundation of a building in which millions are interested, and which is to last for ages.[5]

Marshall and Story, those two great expounders of the Constitution, were impressed with the same idea of the tremendous scope of

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[1] Fiske: Critical Period of American History, 73.
[2] Fiske: The Critical Period of American History, 251; Kasson: Evolution of the United States Constitution, 40.
[3] Kasson: Evolution of the United States Constitution, 138; see also my paper, "Is the Federal Constitution adapted to present necessities, or must the American people have a new one." Yale Law Journal, March, 1908.
[4] Vol. III, Documentary History of the Constitution of the United States of America, 440.
[5] Kasson, 82.

the powers granted by it to the Federal Government, and they took early opportunity to place the Supreme Court on record in favor of such an interpretation of the supreme law as to give effect not only to the distribution of the powers of government within the limits intended by the framers of the Constitution, but which recognized the adaptability of its provisions to changes, so as to "keep pace with the progress of the country."

Story referred to the Constitution as the "great charter of our liberties." He said:

> The instrument was not intended to provide merely for the exigencies of a few years, but was to endure through a long lapse of ages, the events of which were locked up in the inscrutable purposes of Providence.[1]

Said Marshall:

> But a constitution is framed for ages to come, and is designed to approach immortality as nearly as human institutions can approach it. Its course can not always be tranquil. It is exposed to storms and tempests, and its framers must be unwise statesmen indeed, if they have not provided it, so far as its nature will permit, with the means of self-preservation from the perils it may be destined to encounter. No government ought to be so defective in its organization as not to contain within itself the means of securing the execution of its own laws against other dangers than those which occur every day.[2]

The limitations of this paper do not admit of extended references and illustrations of the way the commerce clause has worked. But the sure way to demonstrate that the Federal judiciary has from the beginning disclaimed any interference in this department of government is to call the court itself as a witness. If the commerce among the States needs more regulation than it has had, the fault lies with the people, who, through their Representatives in Congress, have the power, under the Constitution, to define and declare the subject of interstate commerce, for, said Wilson, the—

> Congress has power to make all laws which shall be necessary and proper for carrying into execution every power vested by the Constitution in the Government of the United States or in any of its officers or departments.[3]

It will be remembered that Marshall, though not a member of the Constitutional Convention, took an active part in the campaign for its adoption in Virginia, and in McCulloch *v.* Maryland [4] he characterized it as "intended to endure for ages to come, and consequently to be adapted to the various crises of human affairs." In that case, Webster, in his argument before the Supreme Court, said:

> Congress, by the Constitution, is invested with certain powers, and as to the objects, and within the scope of those powers, it is sovereign.

And the ruling of the court was, that if a certain means to carry into effect any of the powers expressly given by the Constitution to the Government of the Union, be an appropriate measure, not prohibited by the Constitution, the degree of its necessity is a question of legislative discretion, not of judicial cognizance.

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[1] Martin *v.* Hunter's Lessee, 1 Wheat., 304, 326.
[2] Cohens *v.* Virginia, 6 Wheat., 264, 387.
[3] 2 Wilson's Works (Andrew's ed.), 59.
[4] 4 Wheat, 316, 413.

The same thought found expression in the opinion of the court in these words:

> But where the law is not prohibited and is really calculated to effect any of the objects intrusted to the Government, to undertake here to inquire into the degree of its necessity would be to pass the line which circumscribes the judicial department, and to tread on legislative ground.[1]

Shortly afterwards the great Chief Justice said:

> The wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at elections are, in this, as in many other instances, as that, for example, of declaring war, the sole restraints on which they have relied to secure them from its abuse. They are the restraints on which the people must often rely solely in all representative governments.[2]

There is therefore no longer any question as to the unlimited power of Congress over interstate commerce, and whether the power is applicable to any given subject—transportation, the telegraph, insurance, or other interstate enterprises—is for Congress to say and not for the court.

In one of the opinions of that case it was declared:

> The language which grants the power as to one description of commerce grants it as to all.[3]

In speaking of the power of Congress over navigation, Justice Johnson said he did not regard it as a power incidental to that of regulating commerce, but he said:

> I consider it as the thing itself; inseparable from it as vital motion is from vital existence.

Commerce—

Said he—

> in its simplest signification means an exchange of goods; but in the advancement of society, labor, transportation, intelligence, care, and various mediums of exchange become commodities, and enter into commerce; the subject, the vehicle, the agent, and their various operations become the objects of commercial regulations. Shipbuilding, the carrying trade, and protection of seamen are such vital agents of commercial prosperity that the nation which could not legislate over these subjects would not possess power to regulate commerce.

Mr. Justice Field also said, in a later case, that an article of commerce is determinable by the usages of the commercial world.[4]

Chief Justice Waite said of the powers granted by the commerce clause:

> The powers thus granted are not confined to the instrumentalities of commerce, or the postal service known or in use when the Constitution was adopted, but they keep pace with the progress of the country and adapt themselves to the new developments of time and circumstances.[5]

Mr. Justice Miller said that the power of regulation under the commerce clause has been applied "to a method of intercourse which had no existence when the Constitution was framed."[6]

Mr. Justice Brewer more recently said:

> Constitutional provisions do not change, but their operation extends to new matters as the modes of business and habits of life of the people vary with each succeeding generation. The law of the common carrier is the same to-day as when

[1] 4 Wheat, 423.
[2] Gibbons *v.* Ogden, 22 U. S., 1, 197.
[3] Gibbons *v.* Ogden, supra.
[4] Bowman *v.* Railway, 125 U. S., 465.
[5] Pensacola Telegraph Co. *v.* Western Union Telegraph Co., 96 U. S., 1, 9.
[6] Miller on the Constitution, 450.

transportation on land was by coach and wagon, and on water by canal boat and sailing vessel, yet in its actual operation it touches and regulates transportation by modes then unknown, the railroad train and the steamship. Just so it is with the grant to the national government of power over interstate commerce. The Constitution has not changed. The power is the same. But it operates to-day upon modes of interstate commerce unknown to the fathers, and it will operate with equal force upon any new modes of such commerce which the future may develop.[1]

And the late Chief Justice Fuller said:

We can not hold that any articles which Congress recognizes as subjects of interstate commerce are not such.[2]

I cite two illustrations of the exercise by Congress of this power in response to suggestions from the court. The first involved a sharp disagreement between Congress and the court, and the second quickly produced the long-delayed Federal regulation of interstate carriers.

In the Wheeling Bridge case [3] the court held the bridge a nuisance because it was constructed in such a manner as to impede navigation; but Congress afterwards passed an act declaring it to be a post road and a lawful structure, and required boats navigating the Ohio River to lower their smoke stacks so as not to interfere with it, and thereby nullified the prior decision.[4]

Prior to the decision of the Supreme Court in Wabash, St. Louis & Pacific Railroad Co. *v.* Illinois,[5] decided October 25, 1886, the court in the Granger cases had apparently held that it was competent for the State of Illinois to impose certain taxes which constituted a burden upon interstate commerce. Congress had then never legislated upon this subject. The Interstate Commerce Commission, by which the control of Congress was asserted over interstate carriers, was created by an act of Congress passed in 1887.[6] But the majority opinion of the Supreme Court in the Wabash Railroad case, written by Mr. Justice Miller, concluded with these words:

Of the justice or propriety of the principle which lies at the foundation of the Illinois statute it is not the province of this court to speak. As restricted to a transportation which begins and ends within the limits of the State it may be very just and equitable, and it certainly is the province of the State legislature to determine that question. But when it is attempted to apply to transportation through an entire series of States a principle of this kind, and each one of the States shall attempt to establish its own rates of transportation, its own methods to prevent discrimination in rates, or to permit it, the deleterious influence upon the freedom of commerce among the States and upon the transit of goods through those States can not be overestimated. That this species of regulation is one which must be, if established at all, of a general and national character and can not be safely and wisely remitted to local rules and local regulations, we think is clear from what has already been said. And if it be a regulation of commerce, as we think we have demonstrated it is, and as the Illinois court concedes it to be, it must be of that national character, and the regulation can only appropriately exist by general rules and principles, which demand that it should be done by the Congress of the United States under the commerce clause of the Constitution.[5]

The State rights doctrine seems here and there to find advocacy, but it is not a real, live issue; it is only a ghost. Nevertheless, those who are talking about it talk about it as though it was something new. I quote again from James Wilson what he said on this point:

A citizen of America is a citizen of the General Government and citizen of the particular State in which he may reside. The General Government is meant for them

[1] In re Debs, 158 U. S., 591.
[2] Leisy *v.* Hardin, 135 U. S., 100, 125.
[3] 13 How., 519.
[4] Van Santvoord: Lives and Services of the Chief Justices, 529.
[5] 118 U. S., 557.
[6] 3 U. S., Compiled Statutes, 1901, p. 3153.

in the first capacity; the State government in the second. * * * The General Government is not an assemblage of States, but of individuals for certain political purposes. It is not meant for the States, but for the individuals composing them. The individuals therefore, not the States, ought to be represented in it.[1]

The Constitution was passed upon three compromises: The first, already referred to, was the concession of equal representation of the States in the Senate and the establishment of a national system of representation in the lower House. The second, which gave disproportionate weight to the slave States, gained their support. The third, the postponement for 20 years of the abolition of the foreign slave trade, secured absolute free trade between the States, with the surrender of all control over commerce into the hands of the Federal Government.[2]

This concession of absolute power to Congress over commerce so disgusted and enraged Randolph and Mason that they refused to sign the Constitution, and Mason remained its violent opponent.[3]

A letter drafted by the convention to accompany the Constitution contained this statement:

It is obviously impracticable, in the Federal Government of these States to secure all rights of independent sovereignty to each, and yet provide for the interest and safety of all. Individuals entering into society must give up a share of liberty to preserve the rest.[4]

It is too late, in view of the fact that this question involves the original controversy between the States and a central government and the surrender of the power of the State to the Federal Government in the interest of the common weal, to urge it now; and regardless of the impassioned declarations of those who would enlarge the power of the States and minimize that of the Federal Government and thereby disqualify it, the central government is supreme, and will continue to be so, for so it must be.

As individuals we may be proud of the growth, prosperity, development, and culture of the Commonwealths in which we live; but that patriotic sentiment which, when called into action, is the strongest emotion exhibited by freemen, rests upon the fact that we are citizens of the United States and not of Virginia, California, or Nebraska.

It was Madison who said:

The public good, the real welfare of the great body of the people, is the supreme object to be pursued; no form of government whatever has any other value than as it may be fitted for the attainment of this object. Were the plan of the convention adverse to the public happiness, my voice would be, reject the plan. Were the Union itself inconsistent with the public happiness, it would be, abolish the Union. In like manner, as far as the sovereignty of the States can not be reconciled to the happiness of the people, the voice of every good citizen must be, let the former be sacrificed to the latter.[5]

Wilson, in the early days of the convention, made this statement:

On examination it would be found that the opposition to Federal measures had proceeded much more from the officers of the States than from the people at large.[6]

Later he said:

He did not see the danger of the States being devoured by the National Government. On the contrary he wished to keep them from devouring the National Government.[7]

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[1] Kasson, 82.
[2] Fiske: The Critical Period of American History, 317.
[3] Ibid., 314, 403.
[4] Kasson, 197.
[5] The Federalist, No. 45.
[6] Vol. III, Documentary History of the Constitution, 28.
[7] Ibid., 84.

Again he said:

He conceived that, in spite of every precaution, the General Government would be in perpetual danger of encroachments from the State governments.[1]

In this Madison agreed, and expressed the opinion "that there was (1) less danger of encroachment from the General Government than from the State governments. (2) That the mischief from encroachments would be less fatal if made by the former than if made by the latter." [1]

I deny the soundness of criticisms leveled against our Constitution upon the ground that it commits too much power to the Central Government and takes from the States powers which they ought to exercise, for in our national experience the attempted regulation by the States in many, if not all, of the matters that concern the people as a whole, has not worked to the satisfaction of the people, and what the National Government has undertaken, has worked.

It is as true to-day as it was a century ago, that the demand for more power on the part of the States is by the governors and attorneys general of the States, and other State officers who seek to magnify their own offices, and not by the people of the States, few of whom would know that they had been deprived of any rights, either actual or imaginary, unless they were told about it.

Possibly the severest indictment against the American judiciary is the claim that it has exceeded its powers in those decisions where acts of the legislature have been annulled upon the ground that they were unconstitutional, and the charge is made that the judiciary has thereby invaded the legislative department of the Government.

I shall not discuss either the recall of judges or the recall of judicial decisions. (I take the liberty, however, of saying parenthetically, that I do not believe in either of them.) There is no excuse for judicial legislation, but it does not by any means follow that because an act, whether of Congress or of a State legislature, is declared contrary to the paramount law, that the court so holding has committed the offense of legislating.

Senator Sutherland, in a scholarly address before the American Bar Association,[2] referred to the fact that the framers of the Constitution were deeply learned in the science and history of government, and that they knew and sought to avoid the weaknesses and dangers to be guarded against if government by the people should endure; and because they knew that a pure democracy "was a beautiful but a barren and deceptive ideality which had never survived and in the nature of things could never survive the test of practical experience," they sought to establish the foundation of government for the United States of America upon a firmer basis. I quote the Senator's words:

By the Constitution they, therefore, established a representative Republic—a self-limited democracy as distinguished from an unlimited democracy. They provided for the three separate and distinct departments, conferring upon each its appropriate powers, and thereby denying to each any authority to invade the domain of the others. So delicate and yet so strong was the adjustment that the plan has operated with justice and efficiency for more than a century of unchallenged time.

It would be indeed surprising if during the 125 years of the history of jurisprudence in the United States the State supreme courts, num-

[1] Vol. III, Documentary History of the Constitution, 179.
[2] At Milwaukee, August, 1912: Title, "The courts and the Constitution."

bering originally 13 and now increased to 48, had never overstepped the boundary between the judicial and the legislative departments of Government; but the voters of the several States have a ready and speedy remedy against any such assumption of power, and the statement of the present Chief Justice of the Supreme Court of the United States, who, in my opinion, is the greatest jurist of our time, is a conclusive answer to those who, in ignorance of the facts, charge that the national judiciary has encroached upon the powers committed to the other departments of our Government. He said in McCrary's case:

> No instance is afforded from the foundation of the Government where an act, which was within a power conferred, was declared to be repugnant to the Constitution, because it appeared to the judicial mind that the particular exertion of constitutional power was either unwise or unjust.[1]

But the Constitution says "the judicial power shall extend to all cases in law or equity arising under this Constitution."

And the obligation to enforce the Constitution as "the supreme law of the land" is laid on the judiciary in the following terms:

> This Constitution and the laws of the United States which shall be made in pursuance thereof, and all treaties made or which shall be made under the authority of the United States, shall be the supreme law of the land, and the judges in every State shall be bound thereby; anything in the constitution or laws of any State to the contrary, notwithstanding.

It must be remembered that even the Declaration of Independence in which the signers referred to the colonies as "The United States of America," contained no specification of the powers which the Union, as distinct from the States, should exercise.[2]

And the Articles of the Confederation made no provision for supervising or annulling such legislative acts as might be passed in violation of it; hence the controversy between the States and factions, already recited.

The Constitution, which separated the powers of government into the three departments—executive, legislative, and judicial—also conferred three points of previous dispute, viz, taxation, the regulation of interstate and foreign commerce, and the right to acquire or govern colonies, upon the Union; and provided how and by whom legislative acts not within the powers of either the Federal Government or the States might be reviewed or annulled; and although the employment of this extraordinary power involves the possible reversal of the will of a popular majority as crystallized in legislation, its exercise was nevertheless intended to and does register the supreme will of the people according to principles they declared by agreeing to our social and governmental compact, as those principles are stated in the Federal Constitution; but the use of this power does not give the nine men who compose the Supreme Court of the United States any right or privilege to impose their individual opinions upon the people, nor any other power or authority than to state the law as it is, and thereby give effect to the will of the people.

Dr. Pound, discussing the changes going on in the substantive law, and the difficulties confronting the courts in a period of transition,[3] speaks of the difference in the rate of progress between law and

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[1] McCrary *v.* United States, 195 U. S., 27, 54.
[2] Annals of the American Academy, September, 1912, p. 296.
[3] His address, "Social justice and legal justice."

public opinion, and states the necessity for reducing law to fixed rules, as follows:

> In order to preclude corruption, to exclude the personal prejudice of magistrates, and to minimize individual incompetency, law formulates the moral sentiments of the community in rules to which the judgment of tribunals must conform. These rules, being formulations of public opinion, can not exist in any settled form until public opinion has become fixed and settled, and can not change in any far-reaching particular until a change of public opinion has been complete. * * * Public opinion must affect the administration of justice through the rules by which justice is administered rather than through the direct administration.

These observations are especially relevant to complaints of the courts for refusing to enforce legislative acts which violate constitutional authority and lay bare the offense against the social order involved in the use of pressure to compel the courts to respond to popular clamor. Moreover, the very foundations of law are shaken whenever a judge with his ear to the ground substitutes his personal notions, which may be popular, of what the law should be for that which is.

Senator Sutherland, in the address already referred to, thus aptly states the matter:

> To determine whether or not a statute is unconstitutional is not per se the exercise of judicial power any more than it is per se the exercise of legislative power or executive power. * * * When such a case is presented the court must of necessity decide, as between the statute which says one thing and the Constitution which says another and wholly different thing, which of the two controls, and of course must declare, unless the imperious language of that instrument is to be disregarded, that the Constitution, as the "supreme law of the land," necessarily prevails. The court declares the statute void, not because it has the substantive and independent power to pass upon the constitutionality of an act of Congress, for it has no such power, but because—as a necessary incident to the exercise of its undoubted power to decide a controversy properly before it, it must ascertain and determine the law and by the express provision of the Constitution which the court is sworn to uphold and bound to enforce—the Constitution is the "supreme law of the land," which the statute is not unless "made in pursuance thereof."

For, as we held in Norton *v.* Shelby County[1]—

> An unconstitutional act is not law, it confers no right, it imposes no duties, it affords no protection, it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed.

Any individual may disregard a void law as he may disregard a void judgment, and in so doing subject himself to no penalties. The principle involved is thus clearly put forth by Judge Cooley in his treatise on Constitutional Limitations:

> The courts sit, not to review or revise the legislative action, but to enforce the legislative will; and it is only where they find that the legislature has failed to keep within its constitutional limits that they are at liberty to disregard its action; and in doing so, they only do what every private citizen may do in respect to the mandates of the courts when the judges assume to act and to render judgments or decrees without jurisdiction. "In exercising this high authority, the judges claim no judicial supremacy; they are only the administrators of the public will. If an act of the legislature is held void, it is not because the judges have any control over the legislative power, but because the act is forbidden by the Constitution, and because the will of the people, which is therein declared, is paramount to that of their representatives expressed in any law." [2]

In a note to the chapter from which I quote, Judge Cooley refers to the interesting fact that there are at least two cases in American judicial history where demands have been made to impeach judges

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[1] 118 U. S., 425. [2] P. 160, citing Lindsay *v.* Commissioner, 2 Bay (S. C.), 38, 61.

criminals, because they refused to enforce unconstitutional enactments. One of these was in Rhode Island in 1786, the other in Ohio in 1808. These early efforts to effect a judicial recall were not successful, although the cases aroused a great deal of clamor and popular resentment.

This exposition of the basis of the jurisdiction and duty of our courts of last resort, State as well as Federal, reduces criticisms against them, based on their decisions nullifying legislative enactments, to an absurdity.

Whether these current criticisms are made in good faith or not, is not material; that they are made, is the deplorable fact—deplorable because through such criticisms public esteem and respect for law has been lowered. The warning of Mr. Justice Miller is especially pertinent:

> Let me urge upon my fellow countrymen, and especially upon the rising generation of them, to examine with careful scrutiny all new theories of government and of social life, and if they do not rest upon a foundation of veneration and respect for law as the bond of social existence, let them be distrusted as inimical to human happiness.[1]

It seems to be overlooked by these iconoclasts that honor has always attached to the judicial office, and that from the days of Solomon the unjust judge has been execrated corresponding to the degree in which the just judge has been honored; and lawyers have accepted the burdens and responsibilities attaching to the office for the prestige it gave, notwithstanding the inadequate compensation which the public has seen fit to give its judicial servants. And the judges of America in the exercise of their official functions render a higher type of public service and do it more effectively than any other agents of government.

In a weekly magazine of wide circulation there appeared not long since an elaborate argument in favor of the recall of judicial decisions, in which, after a vicious arraignment of John Marshall his associates and successors and their motives, the writer of the article says:

> The Supreme Court now combines in itself both the judicial and legislative powers, and it exercises a general revisory authority over all legislation.

And continuing, and in answer to the question which he asked of himself, as to what is meant by the situation he pictured, he said:

> It means, in the first place, that the judiciary has been established as superior to the other departments of the Government. It means, in the second place, that no economic need of the people can be incorporated into a national law if that economic need does not coincide with the court's economic theories. And it means, in the third place, that the right of the people to say, in the last instance, by what laws they shall be governed has been removed from them.[2]

That statement is deliberately untrue and shows how easily criticism degenerates into libel. Mr. Justice Miller spoke the truth when he said that one may count on his fingers those acts of Congress which have been held unconstitutional for want of constitutional power.[3]

The suggestion of the writer of that article that because the courts of England, Germany, France, and Switzerland do not assert the power to declare laws unconstitutional, our courts need not do so, is not in point, for no obligation is laid by the constitutions

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[1] Miller on the Constitution, p. 33.
[2] Saturday Evening Post for Aug. 31, 1912.
[3] United States *v.* Steffens, 100 U. S., 82.

of those countries upon their courts to decide such questions, but under our Constitutions, Federal and State, our courts are required to enforce the supreme and permanent expressions of the people's will as declared in our written Constitutions, regardless of what subsequent legislatures may enact.

I have referred to the niggardliness of the people toward the judiciary. One cause of the delays experienced by litigants is that in the centers of population there are not enough judges to do the business of the courts with reasonable dispatch, and nearly every court of last resort in the United States has a congested docket. It is true that if the system of administering law were changed so as to do away with so much consideration of mere questions of practice our courts as now constituted could dispose of much more business than at present, but a tremendous increase in litigation is bound to happen when that change comes. Moreover, the salaries of the judges are so absurdly and pathetically inadequate as to create surprise that the public has been able to command so much high-class judicial talent for the pay that has been grudgingly given.

There is something else to be said of and to this mass we call the public and to those who so freely criticize law, lawyers, and the courts; for a great deal of legislation in incidental litigation have been required to check the commercial piracy which is the product of the unparalleled industrial and commercial prosperity enjoyed by the present generation. Competition used to be the life of trade; now it is monopoly, combinations, trusts; and I do not condemn all monopolies, combinations, and trusts; but the gigantic corporations of this day have stifled the small business enterprises which in the days of our sires expanded legitimately and furnished independent business careers. These combinations have sought to curb individual ambition, and some of their methods have been highly reprehensible. The overweening desire of men to get rich in a hurry has bred competitive methods both unfair and corrupt. Immense profits have been piled up through short weights and the adulteration of foods, and the frauds practiced through false prospectuses and watered stocks have enriched dishonest promoters at the expense of a multitude of small investors. Wholesale plundering and thievery on an immense scale have made a yardstick of the criminal code. These things are directly responsible for such legislation as the pure-food law, the bulk-sales bill, the Sherman antitrust law, and the drastic penalties against conspiracies to commit fraud. The public conscience has been so debauched as to regard the theft of a railroad and the robbery of corporate stockholders as high finance. The Equitable controversy developed a state of rottenness which was by no means confined to the Equitable family. I can name the heads of several successful life and fire insurance companies who were the products of this corrupt system, and who, though perhaps not personally moved by dishonest methods, did things which shocked the awakened moral sense of the average citizen, and they died of broken hearts because of the condemnation heaped upon them, just in time to escape the yawning doors of the penitentiary.

The commandment "Thou shalt not steal" is qualified so as to run, "Thou shalt not steal and be caught with the goods." A demand has been created by the public itself for the services of dishonest

lawyers, who are scorned by all honorable members of the bar; and the public, which furnishes a livelihood to shysters, must therefore take full responsibility for what they do. If all business were to be conducted according to the ethical standards which lawyers have prescribed for themselves, there would be a vast improvement in the methods now prevailing.

Certain organizations of men falsely claiming to represent the laboring interests of America have been very bold and lawless, and defiant in their lawlessness. They have encouraged a sentiment hostile to law and the courts, because their views of what the law ought to be have not been accepted in advance of legislation. Acts of violence have been committed within the borders of this State that sent a thrill of horror throughout the civilized world, and the shocking outlawry and crookedness unearthed in the New York police department has made all America gasp. But justice is on the throne in California and New York, and anarchists, dynamiters, bomb throwers, and murderers can not escape the penalty of outraged law.

And it is a good sign that most of the people resent the misdoings and shortcomings of the misdoers and shortcomers. Such resentment shows that the public conscience is alive, and that lethargy and indifference to evil are not becoming traits, but are only faults; it keeps the mills of public sentiment grinding, and they grind fine if they do grind slow.

Each generation is confronted by its own problems, but the checks upon popular impulses written in the Constitution are designed to give effect to sound, mature public opinion, which is always right, and to prevent the baneful effects of passion and haste. Therefore we who live now must not disregard the teachings of history nor the wisdom of the fathers. Let us not commit the supreme folly of distrusting either the beneficence, the strength, or the adaptability of those institutions which are the priceless heritage to us from the ablest company of patriots of any period in history—institutions which are the model for all the peoples of the earth whose hope is for the ultimate recognition and enjoyment of the rights of man.[1]

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[1] The Hon. James Bryce, on the eve of his retirement from the post of British ambassador to the United States, paid the following extraordinary tribute to the Federal Constitution. The occasion was the annual dinner, on December 14, 1912, of the Pennsylvania Society of New York. He spoke from the topic "The commemoration of the one hundred and twenty-first anniversary of the framing of the Constitution of the United States." He said:

"The Constitution was the work of an extraordinary group of men, such as has seldom been seen living at the same time in any country and such as had never been brought together in any other country. The Nation was then a small one, and it is one of the most striking tributes to the genius and foresight of the men that that frame of government which they designed for 3,000,000 people should have proved fitting to serve the needs of 93,000,000. The whole of your history since 1789 is a record of the services which the Constitution has rendered to you. It formed anew, or at least strengthened and developed, the sentiment which was fortunately brought by your ancestors from England, the habit of deference to the law and respect for its forms, with a sense of the value of directing everything by strictly legal methods, which is one of the finest attributes of a free people. It taught you to recognize that a free government must be founded upon the sense of right, upon the respect of every man and community to the exclusion of all violence. It impressed upon every person the sense that the will of the whole people duly ascertained and acting through the prescribed forms must prevail. The doctrine of popular sovereignty is a fine and wholesome principle when it is exercised in the duly prescribed and duly observed forms, just as that doctrine may be the source of turmoil and injury to a people which rush heedlessly to carry out its arbitrary will at the impulse of sudden passion."

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